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Supreme Court, U.S.
FILED
04 721 NOV 22 2004

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Carey v. Saffold*, 536 U.S. 214, 225 (2002), this Court held that, where a California prisoner "unreasonably" delays in filing a state habeas corpus petition after denial in a lower court, that application is not "'pending' during this period" and therefore does not toll the one-year statute of limitations for filing federal habeas corpus petitions. The Court further held that the California Supreme Court's denial of a habeas petition on the merits does not itself "indicate that the petition was timely." *Id.* at 226. The question presented is:

Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition -- and therefore was entitled to tolling during that entire period -- because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

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REGINALD CHAVIS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner William A. Duncan (hereafter "the Warden")[1/] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The August 27, 2004, opinion of the Ninth Circuit Court of Appeals (App. A) is reported at 382 F.3d 921. The Ninth Circuit's September 14, 2004, order granting stay of mandate (App. B) is unpublished. The United States District Court's September 20, 2001, order adopting the findings and recommendations of the magistrate judge and dismissing the application for writ of habeas corpus (App. C) is unpublished.

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1. Warden Anthony Lamarque was named as respondent in the Ninth Circuit opinion. William A. Duncan is now serving as Acting Warden of the Salinas Valley State Prison in Soledad, California.

The magistrate judge's findings and recommendations (App. D) are unpublished.

The California Court of Appeal's September 29, 1994, denial of habeas corpus relief (App. E) is unpublished. The November 10, 1997, petition for writ of habeas corpus (App. F)[2/] and the California Supreme Court's April 29, 1998, denial (App. G) are unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 27, 2004. A timely motion to stay the mandate was granted on September 14, 2004. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTE INVOLVED IN THE CASE

28 U.S.C. § 2244(d) sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the judgment of a state court:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

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2. The Warden has included the first page only of the November 10, 1997, petition for writ of habeas corpus as an appendix. (App. F.) The first page reflects the filing date, which is all that is relevant to this petition for writ of certiorari.

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

In the decision below, the Ninth Circuit disregarded this Court's direct instructions regarding how it should determine whether habeas petitions filed by California prisoners in state appellate courts toll the one-year statute of limitations for filing federal habeas petitions. This blatant refusal to abide by this Court's decisions should not be countenanced, particularly given the frequency with which this issue arises and its importance to fulfilling Congress' objectives in enacting habeas corpus reforms. Certiorari should be granted.

A. Statutory Background and *Carey v. Saffold*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for state prisoners seeking habeas relief in federal courts. 28 U.S.C. § 2244(d)(1). The statute further provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation . . . ." 28 U.S.C. § 2244(d)(2). In *Carey v. Saffold*, 536 U.S. 214, this Court addressed when applications for state collateral review are "pending" following denials of relief by state trial courts.

This Court held that, generally, a state prisoner's application for habeas corpus relief is pending "as long as the ordinary state collateral review process is 'in continuance'—*i.e.*, 'until the completion' of that process." *Id.* at 219-20 (quoting Webster's Third New International Dictionary 1669 (1993)). "In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" *Id.* at 220. Thus, an application for state collateral review is "pending" during the time between a lower state court's denial of an application for collateral review and the filing of a notice of appeal to a higher state court. *Id.* at 220-21.

This Court then applied this rule to California's collateral review scheme. In California, unlike many other states, the collateral review system does not require prisoners to seek appellate review of lower court determinations. Rather, a prisoner seeking collateral review files an original petition for writ of habeas corpus in the different state courts. *Id.* at 221. The Court concluded that a California prisoner's application may be considered "pending" within the meaning of § 2244(d)(2) during the interval between the denial of a state habeas petition and the filing of an original state habeas petition at the next level, as well as while the petition is under

consideration, thereby providing the possibility of continuous statutory tolling. *Id.* at 223.

Having resolved those threshold issues, this Court turned to the question presented in California's petition for a writ of certiorari: Whether an application for state collateral review is "pending" when the application filed in the state appellate court is untimely. The Court answered "no"; an untimely application for state collateral review is not "pending" during the period of delay. The one-year limitations period for filing federal habeas corpus petitions set forth in 28 U.S.C. § 2244(d) is therefore not tolled for that interval. *Id.* at 225.

This Court then applied this untimeliness rule to California's collateral review system. California law does not specify precise time limits for seeking collateral relief. Rather, a state prisoner must file a state petition for writ of habeas corpus "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993), *cited in Saffold*, 536 U.S. at 221-22. This Court recognized that, for this reason, determining whether an application for state collateral review has been timely filed might be difficult in California. Nevertheless, held the Court, this is an inquiry that the federal court must undertake in determining whether the petitioner is entitled to tolling of the AEDPA limitations period. *Saffold*, 536 U.S. at 223, 225-26; *see also id.* at 235 (Kennedy, J., dissenting).

This Court explained that the federal court can determine whether a California petitioner is entitled to tolling during the interval between a lower court decision and the filing of a new petition in a higher court in one of two ways. First, and most obviously, the state court may "clearly rule[]" that the petitioner delayed unreasonably in filing the petition. *Id.* at 226. If so, "that would be the end of the matter" and there is no tolling. *Id.* Second, if the state court does not make specific findings of undue delay, the federal court must apply the *Harris*

reasonableness standard and determine whether the petitioner exercised due diligence in filing the state habeas petition. *Id.* at 225-26.

Turning to Saffold's case, this Court held that the Ninth Circuit erred in relying on the fact that the California Supreme Court denied Saffold's petition "on the merits and for lack of diligence." *Id.* The Ninth Circuit had reasoned that Saffold's petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* at 225 (citing *Saffold v. Newland*, 250 F.3d 1262, 1267 (9th Cir. 2000)). This Court disagreed, explaining that there are many reasons why a state court "will sometimes address the merits of a claim that it believes was presented in an untimely way." *Id.* Accordingly, "[g]iven the variety of reasons why the California Supreme Court may have included the words 'on the merits,' those words cannot by themselves indicate that the petition was timely." *Id.* at 226. The Court added that "the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (C.A.9 2001) (finding limitations period tolled during 4-year gap)." *Id.* This Court therefore vacated the Ninth Circuit's judgment and remanded the case so that the Ninth Circuit could reconsider whether Saffold's state court petition was timely. *Id.* at 226-27.

B. State Court Proceedings

Respondent Reginald Chavis was found guilty in California state court on July 29, 1991, of attempted murder and mayhem with related findings of firearm use and great bodily injury. App. A at 4 (*Chavis v. Lamarque*, 382 F.3d 921, 923 (9th Cir. 2004)); App. D at 1-2. He was sentenced to state prison for an indeterminate term of life with the possibility of

parole, plus eight years for sentencing enhancements. App. A at 4 (*Chavis*, 382 F.3d at 923); App. D at 2. His conviction became final on January 26, 1993. App. D at 4.

Chavis filed his first state petition for writ of habeas corpus in the Sacramento County Superior Court on May 14, 1993, and it was denied by the court on July 30, 1993. App. A at 4 (*Chavis*, 382 F.3d at 923). On August 22, 1994, he filed a petition for writ of habeas corpus with the California Court of Appeal, which was denied on September 29, 1994. App. A at 5 (*Chavis*, 382 F.3d at 923).[3]

More than three years later, on November 10, 1997, Chavis filed a petition for writ of habeas corpus in the California Supreme Court, presenting essentially the same claims. App. A at 5 (*Chavis*, 382 F.3d at 923); App. D at 6. It is this state habeas petition that lies at the center of the instant dispute. On April 29, 1998, the California Supreme Court summarily denied the petition through an order stating, in its entirety, "Petition for writ of habeas corpus is denied." App. A at 5 (*Chavis*, 382 F.3d at 923); App. G.

Chavis then embarked on a second round of unsuccessful state filings. He filed his second habeas petition with the Sacramento County Superior Court on December 15, 1998, but the court ordered that petition "not filed" because Chavis had not properly filled out the appropriate forms. App. A at 5 (*Chavis*, 382 F.3d at 923). On January 25, 1999, he refiled his habeas petition with the superior court, which denied the petition on February 24, 1999. *Id.* Chavis then filed his second habeas petition with the California Supreme Court on December 17, 1999. App. A at 5 (*Chavis*, 382 F.3d at 924). The petition was denied on March 29, 2000 (App. D at 4), and that denial became final on April 28, 2000. App. A at 5 (*Chavis*, 382 F.3d at 927).

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3. Chavis did not exercise his option to file a petition for review in the California Supreme Court after this decision. *See* Cal. Penal Code, § 1506; Cal. Rules of Court, rule 28.

C. Federal District Court Proceedings

On August 30, 2000, Chavis filed his federal petition for a writ of habeas corpus. App. A at 6 (*Chavis*, 382 F.3d at 924). The magistrate judge issued findings and recommended that Chavis's federal habeas petition be denied as barred by the AEDPA statute of limitations. App. A at 6 (*Chavis*, 382 F.3d at 924); App. D at 7, 17-18. The district court adopted the findings and recommendation, and dismissed the petition.[4/] App. A at 6 (*Chavis*, 382 F.3d at 924); App. C at 2.

D. The Decision Below

The Ninth Circuit reversed. The court found that the one-year limitations period was not tolled for 363 days and that Chavis's petition was therefore timely (by two days).[5/]

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4. The Warden agrees with the district court's judgment, though not with its reasoning. All of the federal courts of appeal have granted habeas petitioners a one-year "grace period" following the enactment of AEDPA in which to file a timely habeas petition. *Duncan v. Walker*, 533 U.S. 167, 183 & n.1 (2001) (Stevens, J., concurring) (collecting cases). The district court seemed to assume that the AEDPA grace period could not, under any circumstances, be tolled by state habeas petitions filed and denied before its commencement. *But see Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) ("We have noted that a state habeas petition filed *before* the AEDPA's statute of limitations begins to run tolls the limitation period.").

5. Specifically, the court found that the limitations period was not tolled between the following dates:

> (a) May 29, 1998 (the date on which the California Supreme Court's denial of his first habeas petition became final) and December 15, 1998 (the date on which Chavis improperly filed his second habeas petition with the superior court) -- a total of 200 days;
>
> (b) December 15, 1998 (the date on which Chavis improperly filed his second habeas petition with the superior court) and January 25, 1999 (when he filed a corrected petition with that court) -- a total of 40 days; and
>
> (c) April 28, 2000 (the date on which the California Supreme Court's denial of his second habeas petition became final) and August 30, 2000 (the date on which he filed his federal habeas petition) -- a total of 123 days.

App. A at 11-12 (*Chavis*, 382 F.3d at 927).

As noted, Chavis let more than three years pass between the California Court of Appeal's denial of his habeas petition and filing a petition presenting essentially the same claims in the California Supreme Court. Accordingly, contended the Warden, Chavis had unreasonably delayed in seeking relief from the California Supreme Court and thus did not have a state application for post-conviction review "pending" for the period of more than three years prior to that filing. In the absence of tolling for this period, the additional days in which the limitations period ran pushed Chavis well outside the one-year limitations period.

The Ninth Circuit ruled, however, that Chavis was entitled to statutory tolling throughout his entire first round of state petitions, including the entire three-year period of inactivity between the California Court of Appeal's denial of the petition and the filing of the next petition in the California Supreme Court. App. A at 9 (*Chavis*, 382 F.3d at 926). The court therefore found that the limitations period had run for only 363 days and thus had not expired. App. A at 12 (*Chavis*, 382 F.3d at 927).

The Ninth Circuit recognized that, according to this Court's decision in *Saffold*, Chavis's petition could not be considered "pending" during the three-year interval before the California Supreme Court petition was filed if Chavis had unreasonably delayed in filing it. App. A at 8 (*Chavis*, 382 F.3d

at 925 (citing *Saffold*, 536 U.S. at 223, 225)). The Ninth Circuit, however, refused to determine, in accordance with applicable state law, whether the summary denial by the state Supreme Court should be treated as a denial for lack of timeliness. App. A at 9 (*Chavis*, 382 F.3d at 926). Thus, the court did not apply the standard for timeliness set out by the California Supreme Court in *Harris*, under which a state habeas petition is timely if it is "filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7.

Instead, the Ninth Circuit asserted that "the only relevant inquiry is whether the state court denied the petition as untimely." App. A at 9 (*Chavis*, 382 F.3d at 926). In this case, the California Supreme Court disposed of Chavis's petition by issuing a summary denial without comment or citation. App. G The Ninth Circuit observed that "[w]hen the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits." App. A at 9 (*Chavis*, 382 F.3d at 926). The court concluded that "because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling." *Id.* The court did not explain how this approach could be reconciled with the holding in *Saffold*, 536 U.S. at 225-26, that a denial on the merits does not, in and of itself, indicate that a state habeas petition was timely filed. The court merely cited the Ninth Circuit's decision on remand in *Saffold*, which did not provide such an explanation either. *Id.* (citing *Saffold v. Carey*, 312 F.3d 1031, 1034-36 (9th Cir. 2002)).[6]

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6. The Ninth Circuit also rejected the Warden's contention that Chavis was not entitled to statutory tolling for the almost ten-month interval between denial of his second habeas petition in the superior court and the filing of his second habeas petition in the California Supreme Court. App. A at 7-8 & n.3; A at 11 (*Chavis*, 382 F.3d at 925 & n.3; *id.* at 927). Although the Warden believes the Ninth Circuit erred in holding that he waived this argument, the Warden is not asking this Court to review that holding.

REASONS FOR GRANTING THE PETITION

At issue here is the important federal question of how federal courts, for purposes of applying the AEDPA statute of limitations, should determine whether a state habeas corpus petition has been timely filed. Under the Ninth Circuit's rule, federal courts must treat a California state court's summary denial as conclusive evidence that a habeas corpus petition was timely filed under state law. Yet this Court, in *Carey v. Saffold*, vacated a Ninth Circuit judgment for invoking virtually an identical rule. This Court explained at length why a state appellate court's denial of a habeas petition on the merits "cannot by [itself] indicate that the petition was timely." *Saffold*, 536 U.S. at 226. Indeed, the Court criticized the Ninth Circuit rule for "threaten[ing] to undermine the statutory purpose of encouraging prompt filings in federal court." *Id.* It is difficult to imagine a more blatant instance of a court of appeals declining to follow the instructions of this Court than the decision below.

In California, many, if not most, petitions for writ of habeas corpus among the thousands filed each year in the state court of appeal and supreme court are summarily denied, as in this case, without comment or citation. Under the Ninth Circuit's rule, such state petitions must be deemed "pending" prior to filing even when they were filed after delays of many months or years, and even though such petitions would be untimely under the California state courts' doctrine of untimeliness. The Ninth Circuit's rule therefore insulates California prisoners from the effect of the AEDPA statute of limitation and frustrates Congress's intent to expedite the federal habeas process.

Furthermore, the Ninth Circuit's tolling rule conflicts with or is inconsistent with decisions of the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits. Resolution of this case will ensure that the thousands of federal habeas petitions filed in California each year will be subject to the nationally binding tolling rule established by this Court's interpretation of 28 U.S.C. § 2244(d)(2) in *Carey v. Saffold* and will prevent the Ninth Circuit from unfairly granting statutory tolling in California cases "when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226.

A. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Carey v. Saffold*

As previously discussed, this Court in *Carey v. Saffold* held that the AEDPA statute of limitations is not tolled "during th[e] period" in which a petitioner "delayed 'unreasonably' in seeking California Supreme Court review." *Saffold*, 536 U.S. at 225. This Court further held that, in determining whether Saffold had so delayed, the Ninth Circuit had erred in relying on the fact that the California Supreme Court denied Saffold's petition "on the merits and for lack of diligence." *Id.* at 225-26. The Ninth Circuit had reasoned that the petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* at 225 (citing 250 F.3d at 1267). This Court explained why that reasoning was flawed, and why a denial on the merits does not compel a conclusion that the petition was timely filed:

> A court will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for decision; or where the court wishes to show a prisoner

> (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief. Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely. And the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (C.A.9 2001) (finding limitations period tolled during 4-year gap). The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.

Id. at 225-26.

Saffold's reasoning applies with equal force to the summary denial that issued in the present case, and should apply to the summary denials that will issue in thousands more California cases. If an explicit ruling on the merits (such as the ruling in Saffold's case) cannot be taken as an "absolute bellwether" of timeliness, it follows *a fortiori* that an implicit or presumed ruling on the merits (such as the ruling on Chavis's petition) cannot either.[7]

Nor does the absence of a specific finding of untimeliness in the California Supreme Court's order take this case outside the holding of *Saffold*, in which the California Supreme Court

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7. The California Supreme Court has explained that its practice is to issue a "summary denial" whenever a habeas petition does not state a prima facie case for relief or if the claims are procedurally barred. *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994); *see also In re Clark*, 855 P.2d 729, 741, 760 (Cal. 1993). The California Supreme Court will sometimes - but not always - indicate a procedural bar by including a case citation in its summary denial. *In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998).

had denied Saffold's habeas petition "on the merits and for lack of diligence." The explicit holding of this Court was that "those words ['on the merits'] cannot by themselves indicate that the petition was timely." *Saffold*, 536 U.S. at 226. That holding, by its terms, applies to a summary disposition that implicitly denies a petition "on the merits." This is made crystal clear by this Court's reference to, and implicit criticism of, the Ninth Circuit's decision in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001), *vacated by Welch v. Carey*, 341 F.3d 869 (9th Cir. 2003) (granting rehearing en banc).

In *Welch*, the Ninth Circuit considered a petition filed in the California Supreme Court four years and five months after denial by the lower court. *Welch v. Newland*, 267 F.3d at 1015. The petition was denied by the California Supreme Court without comment or citation, just as in this case. *Id.* The Ninth Circuit allowed tolling for the four-year gap "[b]ecause the California Supreme Court had addressed the petitioner's claim on the merits." *Id.* at 1017. In *Saffold*, this Court quite correctly referred to *Welch* as an example of how the Ninth Circuit's reliance on a merits determination "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. Under the Ninth Circuit's reasoning in *Chavis*, however, Welch's habeas petition filed in the California Supreme Court after a delay of four years and five months would have to be considered timely.[8]

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8. Ultimately, in *Welch*, an en banc panel of the Ninth Circuit disallowed tolling for the period of four years and five months, on the ground that, by dropping his original claim, Welch had abandoned his first full round of review and had initiated a new round. *Welch v. Carey*, 350 F.3d 1079, 1082 (9th Cir. 2003) (en banc). The case therefore did not decide whether the four-year gap, followed by a summary denial without comment or citation, resulted in an untimely filing. *See id.* at 1083-84; *see also Gaston v. Palmer*, No. 01-56367, slip op. at 15250-51, 15254-56 (9th Cir. Oct. 28, 2004).

This case is indistinguishable from *Welch*, and like *Welch*, "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. This Court's reference to *Welch* would have been nonsensical had the Court intended its ruling to apply only where a state court denied a petition expressly "on the merits" *and* "for lack of diligence." *See also id.* at 235 (Kennedy, J., dissenting) (expressing the understanding that the Court's rule would apply to those cases in which "the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay").

To comply with this Court's holding in *Saffold*, the Ninth Circuit should have recognized that the state court's silent denial did not establish that the petition was timely field. The court should then have applied state law and determined whether Chavis acted "within a reasonable time after [he] or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7. By declining to do so — and instead adopting a *per se* rule that summarily denied habeas petitions were timely filed under California law — the Ninth Circuit has disregarded this Court's decision in *Saffold*, disregarded California state law governing the timeliness of habeas petitions, and undermined the AEDPA limitations period. Under the Ninth Circuit's rule, all such summary denials will render the petition timely filed and all will provide tolling of the AEDPA period of limitation for the period of inactivity preceding the filing, even if the petitioner has delayed three years, thirteen years, or thirty years.

B. The Ninth Circuit's Decision Creates A Conflict Among The Circuits

By establishing a tolling rule that treats a California state court denial on the merits as conclusive evidence that the habeas corpus petition was timely filed under state law regardless of an actual delay of many months or years, the Ninth Circuit has created a direct conflict with the Fourth Circuit, and a conflict in principle with four other circuits, the Fifth, Seventh, Tenth, and Eleventh.

In *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), the Fourth Circuit confronted the same situation that the Ninth Circuit faced here. As in California, there is no "fixed appellate deadline under North Carolina law." *Allen*, 276 F.3d at 186. Under North Carolina law, a non-capital prisoner whose "motion for appropriate relief" has been denied by the superior court may seek review by filing a petition for certiorari in the North Carolina Court of Appeals, and such a petition "must be filed 'without unreasonable delay.' N.C.R. App. P. 21(e)." *Id.* As in this case, the North Carolina Court of Appeals rejected Allen's petition through a summary order, without making any finding of untimeliness. *Id.* In direct conflict with the Ninth Circuit, the Fourth Circuit did not interpret the state court order as conclusively establishing that the state petition was timely.

The *Allen* court explained that, although Allen's petition had not been dismissed as untimely by the state court, it did not follow that there was no "unreasonable delay" under the North Carolina statute. *Allen*, 276 F.3d at 186-87. This is because "the court of appeals may simply have opted to 'excuse[] the untimeliness as a matter of state law and rule[] on the merits.'" *Id.* at 187 (quoting *Fernandez v. Sternes*, 227 F.3d 977, 981 (7th Cir. 2000)). Consequently, the *Allen* court remanded the case for further proceedings to determine whether Allen's certiorari petition was timely under the state's "without unreasonable delay" standard that required a determination of whether or not

the petition would be subject to dismissal under the equitable doctrine of laches. *Id.*

The Ninth Circuit's decision is also irreconcilable with the decisions of four other courts of appeal that have addressed the related issue of how to treat (for tolling purposes) state post-conviction applications that are undeniably untimely under the determinate state deadline, but which state courts nevertheless elect to review on the merits. Four of the five courts of appeal to address the issue have concluded that the federal limitations period is not tolled during the time period between the expiration of the deadline for filing the state application and the date on which the untimely application is finally filed. These decisions confirm the basic principle that eluded the Ninth Circuit in this case: that a state court's decision to rule on an application for collateral review on its merits is not inconsistent with that application still being untimely under state law such that it does not toll the federal one-year limitations period.

For example, in *Fernandez v. Sternes*, 227 F.3d at 980-81, the Seventh Circuit severely criticized the Ninth Circuit's tolling rule as set forth in *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000), *amended* 250 F.3d 1262, *vacated by Carey v. Saffold*, 536 U.S. at 227, stating that it preferred "reality" over the Ninth Circuit's "make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing." The Seventh Circuit explained that:

> It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim.

Fernandez, 227 F.3d at 980. Accordingly, the Seventh Circuit did not grant tolling for the interval between denial by the Illinois appellate court and the untimely filing in the Illinois Supreme Court. *Id.* at 981.

The *Fernandez* court's critique of the Ninth Circuit's original tolling rule is equally applicable to the tolling rule established in the instant case, which resurrects the approach initially taken by the Ninth Circuit in *Saffold*. The Ninth Circuit's continued practice of granting tolling under 28 U.S.C. § 2244(d)(2) for delays of many months or years "as long as the state court denied the belated request on the merits" continues to be, in the words of the Seventh Circuit, an "implausible understanding of § 2244(d)(2)" that will "sap the federal statute of limitations of much of its effect." *Id.* at 980.

Decisions from the Fifth, Tenth, and Eleventh Circuits show that *Allen* and *Fernandez* represent the majority view. *See Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (holding that a "state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state court"); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (holding that "[a] state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application. Thus, after the appeal period has lapsed, an application ceases to be pending but a subsequently properly filed application entitles the petitioner to additional tolling beginning at the time of the 'proper' filing"); *Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (holding "that the petitioner's belated appeal motion was not pending during the limitations period" because such an application "does not relate back so as to toll idle periods").

Just as prisoners who fail to timely file their applications for state collateral review in states with precise time limits will fail to qualify for tolling during the period of delay even though their state courts choose to decide their claims on the merits, prisoners in California who fail to timely file their state petitions

by engaging in substantial delay under California law should not qualify for tolling under *Carey v. Saffold* even though the state court addresses their claims on the merits and even though the state court does not make an explicit finding of untimeliness. The critical issue is not whether a California court fails to impose a procedural bar for lack of diligence and instead issues a summary denial on the merits. Rather, the critical issue is whether the prisoner has timely filed his state petition under California law, thereby qualifying for tolling under 28 U.S.C. § 2244(d)(2) and *Carey v. Saffold*. The Ninth Circuit's approach to this issue is contrary to the approach followed in the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits. Certiorari should be granted to resolve the circuit conflict.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: November 22, 2004

Respectfully submitted,

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CC:ky
SA2004US0004

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGINALD CHAVIS, *Petitioner-Appellant,* v. **ANTHONY LEMARQUE, Warden,*** *Respondent-Appellee.*	No. 01-17072 D.C. No. CV-00-02496-WBS/ GGH OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding

Submitted May 10, 2004**
San Francisco, California

Filed August 27, 2004

Before: Betty B. Fletcher, Stephen S. Trott, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Betty B. Fletcher

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that as long as the petitions are properly

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*Anthony LeMarque has replaced Sylvia Garcia as the warden of the Salinas Valley State Prison.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. R. 34(a)(2).

filed, a habeas petitioner is entitled to tolling of the statue of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA) during subsequent rounds of state review.

Appellant Reginald Chavis, convicted of attempted first degree murder in California state court in 1991, petitioned for habeas corpus in federal district court in 2000. The district court found that Chavis was not entitled to statutory tolling for his first round of pre-AEDPA state habeas petitions that were filed in the Superior Court in 1993, the Court of Appeal in 1994, and the California Supreme Court in 1997, and denied on the merits in 1998. The court found that because Chavis's second round of state petitions, started in 1999, were filed more than one year after AEDPA's active date, Chavis's federal petition was barred.

Chavis appealed.

[1] Tolling of the AEDPA statute of limitations is allowed while a federal habeas petitioner has properly filed state habeas petitions that are pending. **[2]** "Pending" means in continuance or not yet decided. A petition is clearly pending after it is filed with a state court, but before that court grants or denies the petition. **[3]** Chavis's second round habeas petitions were pending while they were properly before the California courts for decision. **[4]** Because Chavis's 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he was entitled to tolling.

[5] A state habeas petition filed before the AEDPA statute of limitations begins to run tolls the limitation period. **[6]** A habeas petition is considered pending during one full round of state review, which in California includes petitions filed in Superior Court, the Court of Appeal, and the Supreme Court.

As long as the petition are properly filed, a habeas petitioner is also entitled to tolling during subsequent rounds of state review.

[7] Chavis was entitled to tolling for the entire first round of state petitions, which he began before AEDPA was enacted. Therefore, the one-year statute of limitations under AEDPA did not begin running until the day after California Supreme Court's denial of Chavis's habeas petition became final. **[8]** The statute was not tolled during the interval between the first and second rounds of Chavis's state petitions. **[9]** Tolling recommenced when Chavis properly started his second round of state habeas petitions. **[10]** The statute was again tolled during the second round of petitions until the date the California Supreme Court's denial of Chavis's second petition became final. Chavis's federal petition was timely filed within the one-year statute of limitations. **[11]** The district court's dismissal of Chavis's federal petition as untimely had to be reversed.

COUNSEL

Reginald Chavis, petitioner/appellant in propria persona.

Bill Lockyer, Attorney General of the State of California, and Catherine Chatman, Deputy Attorney General of the State of California, Sacramento, California, for respondent/appellee Anthony LeMarque.

OPINION

B. FLETCHER, Circuit Judge:

In 1991, Reginald Chavis was convicted of attempted first degree murder with the use of a weapon in Sacramento County Superior Court. He unsuccessfully challenged his conviction on direct appeal in California state courts and then filed two rounds

of state habeas petitions. All of Chavis's state petitions were denied, and he filed a federal habeas petition on August 30, 2000. The issue before us is whether Chavis's federal petition was filed within the one-year statute of limitations provided by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[1] The district court dismissed the petition as untimely. We reverse.

I. Background

The timeliness of Chavis's federal petition depends on whether he is entitled to statutory tolling for each of his state habeas petitions. 28 U.S.C. § 2244(d)(2) (allowing tolling for "properly filed" state habeas petitions while such petitions are "pending"). We therefore set forth in detail the procedural history of his case.

A. Conviction and Direct Appeal

On July 29, 1991, a jury convicted Chavis of attempted murder for the shooting of Katrina Haines. Chavis was sentenced to life with the possibility of parole. Chavis appealed the conviction to the California Court of Appeal and California Supreme Court. Both appeals were denied, the latter on October 28, 1992.

B. First Round of State Habeas Petitions

Chavis filed a habeas petition in Sacramento Superior Court on May 14, 1993, which was denied on the merits on July 30, 1993. Chavis filed a substantially similar petition in the

1. AEDPA's one year statute of limitations applies because Chavis filed his federal habeas petition after AEDPA's effective date, which was April 24, 1996. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001).

California Court of Appeal on August 22, 1994, and that petition was denied on September 29, 1994.

AEDPA and the one-year statute of limitations for federal habeas petitions took effect on April 24, 1996.

On November 5, 1997, the California Supreme Court received Chavis's habeas petition. The Court denied the petition on April 29, 1998, without any comment or case citation. That decision became final on May 29, 1998.

C. Second Round of State Habeas Petitions

Chavis filed a second habeas petition in Superior Court on December 15, 1998. On January 5, 1999, the Superior Court ordered the petition "not filed" because Chavis, a pro se prisoner, had not filled out the habeas form in accordance with court procedures. On January 25, 1999, Chavis refiled his habeas petition with the Superior Court in the proper format, and it was denied on February 24, 1999. The Superior Court held that the successive petition was barred for "procedural reasons" because it was presented in a "piecemeal" manner. *In re Chavis*, No. 99F00573 at *1 (Sacramento Super. Ct., Feb. 24, 1999) (citing *In re Clark*, 5 Cal. 4th 750, 774 (1993)). It also held that the claims were not presented with "due diligence" because seven years passed between Chavis's conviction and the second petition. *Id.* (citing *In re Robbins*, 18 Cal. 4th 770, 780 (1998)).

Chavis filed a second petition in the California Supreme Court on December 17, 1999. That petition was summarily denied with citations to *Clark*, 5 Cal. 4th 750, *Robbins*, 18 Cal. 4th 770, and *Ex parte Dixon*, 41 Cal. 2d 756, 759 (1953). The denial became final on April 28, 2000.

D. Federal Habeas Petition

Chavis filed his federal habeas petition with the district court on August 30, 2000. The magistrate judge made findings and recommendations that Chavis was not entitled to statutory tolling for state habeas petitions filed prior to the enactment of AEDPA, and that because all subsequent state petitions were filed more than one year after AEDPA's active date, Chavis's federal petition was barred. The district court adopted the findings and recommendations in full on September 18, 2001. Chavis appeals. The state concedes that the district court erred in its reasoning, but argues that Chavis is still not entitled to tolling for any of his state petitions.

II. Analysis

We review de novo the district court's dismissal of Chavis's 28 U.S.C. § 2254 petition on statute of limitations grounds. *See Jenkins v. Johnson*, 330 F.3d 1146, 1149 (9th Cir. 2003). We first hold that Chavis is entitled to tolling while his second round of state petitions was pending, even though the petitions were denied on procedural grounds, because the state court's ultimate decision on a particular petition does not affect whether that petition is "pending" *while the court considers it*. Second, we hold that Chavis is entitled to tolling for the three-year interval between his first round petitions to the California Court of Appeal and California Supreme Court — an interval during which AEDPA took effect — because the California Supreme Court did not dismiss the petition as untimely but rather decided it on the merits. Finally, we set forth the proper calculation of the periods for which Chavis is entitled to tolling, and conclude that Chavis's federal habeas petition was timely filed.

A. Definition of Pending

[1] 28 U.S.C. § 2244(d)(2) allows tolling of the AEDPA statute of limitations while a federal habeas petitioner has

"properly filed" state habeas petitions that are "pending."[2] The state contends that under *Carey v. Saffold*, 536 U.S. 214, 219-21 (2002), Chavis's second round petitions were never pending in the state courts, even while the courts had the petitions under submission, because the state courts eventually denied the second round petitions for procedural reasons. The state's argument misapprehends Supreme Court precedent and distorts the plain meaning of the word "pending."

The *Saffold* Court did rely on the state court's decision on whether a habeas petition was untimely to determine whether the state petition was pending, but in a different context: the Court was considering whether the word pending in the habeas statute applied to a time gap between the petitioner's habeas petitions in the California Court of Appeal and the California Supreme Court. *Id.* at 217-18. This was an issue because in California, petitioners file separate writs at each court level instead of appeals, and California uses a "reasonableness" standard rather than a strict time limit to determine whether the next writ was timely filed after the first was denied. *Id.* at 221-22.

[2] While *Saffold* clearly applies to determine whether a second round habeas petition was pending *between* levels of review, it is not relevant to whether the second round habeas petitions were pending *while the state courts were considering them*. "The dictionary defines 'pending' . . . as 'in continuance' or 'not yet decided.'" *Id.* at 219 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993)). A

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2. A "properly filed" petition is one that has been "delivered and accepted in compliance with 'the applicable laws and rules governing filings.'" *Smith v. Duncan*, 297 F.3d 809, 812 (9th Cir. 2002) (quoting *Dictado v. Ducharme*, 244 F.3d 724, 726-27 (9th Cir. 2001)). The government only argues that one of Chavis's filings was improperly filed — the November 15, 1998 filing in Sacramento County Superior Court — and we discuss that filing *infra* at section II.C.

petition is clearly pending after it is filed with a state court, but before that court grants or denies the petition.

[3] Under the state's strained definition of "pending," a habeas petitioner would not know whether he was entitled to tolling for a petition filed in state court until the court granted or denied his petition. In the meantime, the AEDPA statute would be running and often would expire before the state court decided the case. So long as a state procedure for filing the habeas petition exists, the petition is pending while the state court considers it, whether the decision is ultimately on the merits or on procedural grounds. *See Jenkins*, 330 F.3d at 1153 (citing *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999)). Chavis's second round habeas petitions were pending while they were properly before the California courts for decision.[3]

B. Reasonableness of Delay Between First Round Petitions

The state also argues that the three-year delay between Chavis's first round California Court of Appeal and Supreme Court petitions was unreasonable, and therefore cannot be tolled. In contrast to the issue of what is "pending," this is an appropriate situation in which to apply *Carey v. Saffold*, because we must decide whether Chavis had a pending petition during "intervals between a lower court decision and a filing of a new petition in a higher court." *Saffold*, 536 U.S. at 222. The *Saffold* Court held that a petition is considered pending during such intervals unless the petitioner unreasonably delayed filing a new petition at a higher level. *Id.* at 223, 225. The Court then remanded for us to decide whether Saffold had unreasonably

3. The state does not argue that Chavis delayed unreasonably before filing his second round petition with the California Supreme Court after his second round Superior Court petition was denied. He is therefore entitled to tolling during the entire round.

delayed. *Id.* at 226. On remand, we held that because the California Supreme Court did not deny Saffold's petition as untimely, but rather on the merits and for lack of diligence in filing his initial petition, the delay in filing the California Supreme Court petition was not unreasonable. *Saffold v. Carey*, 312 F.3d 1031, 1035-36 (9th Cir. 2002).

The state argues that we must determine the reasonableness of the three-year delay during Chavis's first round of state petitions, looking to state law. However, we rejected that approach on remand in *Saffold*, and held that the relevant inquiry is whether the state court denied the petition as untimely. *Id.* at 1034-36.

[4] Under our decision in *Saffold*, because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling. *See id.* When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits. *Hunter v. Aispuro*, 982 F.2d 344, 348 (9th Cir. 1992) (9th Cir. 1992). Therefore, the California Supreme Court's summary denial was on the merits, and the petition was not dismissed as untimely. *See id.*; *see also Delhomme v. Ramirez*, 340 F.3d 817, 819, 820 n.2 (9th Cir. 2003) (noting that there was no indication that a state habeas petition was untimely where the California Supreme Court denied the petition without comment or citation). As a result, Chavis is entitled to tolling during his first round of state petitions.[4]

4. We note, as have other courts, that habeas petitioners should take care to avoid delays between state petitions. "Should the state courts wish (as will usually be the case) to deny such tardily-filed petitions on timeliness grounds, prisoners will find that the door to the federal courthouse is closed as well." *Romero v. Roe*, 130 F. Supp. 2d 1148, 1151 (C.D. Cal. 2001) ("Romero got lucky. The California Supreme Court denied his . . .

C. Chavis's Federal Habeas Petition Was Timely Filed

[5] We set forth in this section the proper calculation of the time periods for which Chavis was entitled to tolling, when he had properly filed state petitions pending. *See* 28 U.S.C. § 2244(d)(2). The district court dismissed the petition as untimely because it held that Chavis's first state habeas petitions, filed in 1993 and 1994, did not toll the one-year statute, since AEDPA was not enacted until 1996. The district court erred.[5] A "state habeas petition filed *before* the AEDPA statute of limitations begins to run tolls the limitation period." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (citing *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001)).

[6] A habeas petition is considered pending during one full round of state review, which in California includes petitions filed in Superior Court, the Court of Appeal, and the Supreme Court. *Nino*, 183 F.3d at 1005-06. As long as the petitions are properly filed, a habeas petitioner is also entitled to tolling during subsequent rounds of state review. *See King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003) (per curiam) (recognizing that a habeas petitioner may be entitled to tolling during a second round of petitions, but holding that the statute is not tolled between rounds); *Dils v. Small*, 260 F.3d 984, 985-86 (9th Cir. 2001) (noting that petitioner was entitled to tolling during first, second, and third rounds of state habeas petitions but not between rounds); *see also Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) ("[I]f a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent petition is pending in the state court system.").

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petition on the merits.").

5. The state concedes that this holding was error.

[7] Chavis filed a first round of state habeas petitions in the Superior Court in 1993, the Court of Appeal in 1994, and the California Supreme Court in 1997. Although AEDPA took effect on April 24, 1996, Chavis is entitled to tolling for the entire first round of state petitions, which he began before AEDPA was enacted. Therefore, the one-year statute of limitations under AEDPA did not begin running until the day after California Supreme Court's denial of Chavis's habeas petition became final on May 29, 1998. *See Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002) (noting that the California Rules of Court provide that a California Supreme Court judgment becomes final thirty days after it is issued and holding that the federal statute begins running the day after the state judgment becomes final).

[8] The statute was not tolled during the interval between the first and second rounds of Chavis's state petitions. *See Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003). Nor was it tolled when Chavis submitted a petition on December 15, 1998 that was deemed "not filed" because Chavis did not use the proper form. *See Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that a state habeas petition is " 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings") (quoting 28 U.S.C. § 2244(d)(2)); *see also Smith*, 297 F.3d at 812. Therefore, Chavis's petition was not tolled between May 29, 1998 and January 25, 1999, a period of 240 days.[6]

[9] Tolling recommenced on January 25, 1999, when Chavis properly filed his Superior Court petition and started a second round of state habeas petitions. *See Smith*, 297 F.3d at 812 (holding that petition was "properly filed" even though the state

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6. The state's brief contains a miscalculation of this period: it states that there are 271 days rather than 240 days between May 29, 1998 and January 25, 1999.

court denied it as procedurally barred because the petition was delivered to and accepted by the state court).

[10] The statute was again tolled during the second round of petitions, from the proper filing in Superior Court on January 25, 1999, until April 28, 2000, the date the California Supreme Court's denial of Chavis's second petition became final. *See id.* Chavis filed a federal habeas petition on August 30, 2000, which was 123 days after the final denial of his last state petition. Chavis's federal petition was close to the deadline, but timely: there are only 363 days that were not tolled, so his petition was filed within the one-year statute of limitations.

III. Conclusion

[11] Chavis is entitled to tolling of the federal statute of limitations for the time during his first and second rounds of state habeas petitions but not between the two rounds. We reverse the district court's dismissal of Chavis's federal petition as untimely and remand for the district court to consider the merits of Chavis's petition.

REVERSED and REMANDED.

APPENDIX B

FILED
SEP 14 2004
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REGINALD CHAVIS, Petitioner-Appellant, v. **ANTHONY LEMARQUE, Warden,** Respondent-Appellee.	No. 01-17072 D.C. No. CV-00-02496-WBS/GGH Eastern District of California, Sacramento ORDER

Before: B. FLETCHER, Circuit Judge.

Appellee's Motion for stay of the issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41(d).

The mandate is stayed pending the filing of a petition for writ of certiorari in the Supreme Court. The stay expires ninety (90) days from the date of this order unless Appellee files a petition for the writ and so notifies the Clerk of our court in writing within the period of the stay. In that case, the stay shall continue until final disposition by the Supreme Court.

APPENDIX C

FILED
SEP 20 2001
Clerk, U.S. District Court
Eastern District of California
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD CHAVIS,

Petitioner, No. CIV S-00-2496 WBS GGH P

vs.

SYLVIA GARCIA,

Respondent. ORDER

_____/

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On July 9, 2001, the magistrate judge filed findings and recommendations herein which were served on petitioner and

which contained notice to petitioner that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed July 9, 2001, are adopted in full; and

2. Respondent's February 13, 2001, motion to dismiss is granted, and this action is dismissed.

DATED: September 18, 2001.

/s/
UNITED STATES DISTRICT JUDGE

/chav2496.804

APPENDIX D

FILED
JUL 09 2001
Clerk, U.S. District Court
Eastern District of California
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD CHAVIS,

Petitioner, No. CIV S-00-2496 WBS GGH P

vs.

SYLVIA GARCIA,

Respondent. FINDINGS & RECOMMENDATIONS

_____/

Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action was filed on August 30, 2000. Petitioner challenges his 1991 convictions for attempted first degree murder (Cal. Penal Code §§ 664, 187), and enhancements for infliction of great bodily injury (Cal. Penal Code § 12022.7),

and personal use of a firearm (Cal. Penal Code § 12022(a)).[1/] Petitioner was sentenced to state prison for life with the possibility of parole, plus eight years. The petition raises the following claims: 1) breakdown in attorney/client relationship infected all proceedings, 2) petitioner was denied substitution of counsel, 3) petitioner was not allowed to represent himself, in violation of the constitution, 4) ineffective assistance of trial counsel, 5) ineffective assistance of counsel on appeal, and 6) denial of due process when trial court disallowed evidence of third party's culpability.

Pending before the court is respondent's February 13, 2001, motion to dismiss on grounds that this action is barred by the statute of limitations. Petitioner has filed an opposition, to which respondent has filed a reply. After carefully reviewing the record the court recommends that the motion to dismiss be granted.

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1. The sentence for being armed with a firearm and mayhem were stayed.

Discussion

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. AEDPA amended 28 U.S.C. § 2244(d)(1) so that it now provides,

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Petitioner was convicted by a jury and was sentenced on September 6, 1991. Petitioner filed an appeal with the state appellate court which was denied on July 30, 1992. Respondent's Exh. B. Petitioner then sought review before the California Supreme Court on September 4, 1992. That court denied the appeal on October 28, 1992.[2/] His conviction therefore became final on January 26, 1993, which was ninety days after the California Supreme Court denied his petition for review. See Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). Because this date was prior to the enactment of the AEDPA, the statute of limitations expired one year from the enactment date, April 24, 1996. Unless otherwise tolled, petitioner then had one year from that date, i.e., until April 24, 1997, to file the instant petition. See Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1286-87 (9th Cir. 1997), overruled on other mounds, Calderon v. United States Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998);

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2. Respondent has submitted this date without the opinion itself. Petitioner represents the date as "10-92."

Patterson v. Stewart, __ F.3d __ , 2001 WL 575465 (9th Cir. May 30, 2001). The instant federal petition, filed August 30, 2000, is over three years late.

A. Statutory Tolling

Section 2244(d)(2) provides that "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999) the Ninth Circuit held that for purposes of § 2244(d) the time must be tolled for the entire period in which a petitioner is appropriately pursuing and exhausting his state remedies, i.e., from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

According to the parties' recitation of petitioner's collateral review history, petitioner first filed a habeas corpus petition with Sacramento County Superior Court on May 14, 1993. It was denied on July 30, 1993. Petitioner's next habeas petition was filed on August 22, 1994, with the California Court of Appeals. It was denied on September 24, 1994.[3] A habeas petition filed with the California Supreme Court on November 10, 1997 was denied on April 29, 1998. Petitioner then filed another habeas petition with the Sacramento County Superior Court on December 15, 1998,[4] which was ordered "not filed" on January 5, 1999. Petitioner then filed a third habeas corpus petition with the superior court which was denied on February 24, 1999.[5] Petitioner's last state habeas petition was filed with the state supreme court on December 17, 1999. It was denied on March 29,

3. According to respondent, it was denied on September 29, 1994.

4. Petitioner asserts that this petition was filed on May 27, 1998.

5. According to petitioner, either the second or third petition with the superior court was denied on April 15, 1999. Petition, at 5a.

2000.

These petitions for collateral review do not serve to toll the statute and therefore the reasons for the various courts' denials will not be discussed here. The first two petitions were filed and denied before the statute of limitations began to run, and therefore do not toll the statute. The series of petitions following the first two denials were all filed subsequent to the expiration of the statute of limitations, or after April 24, 1997, so they cannot toll the statute. See Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000) (under § 2244(d)(2), a petition must be "pending" in order to toll the limitations period).

Therefore, the present petition is barred. Petitioner makes two arguments in his opposition, that the state created impediments to his timely filing,[6] and that he is actually

6. The substance of petitioner's argument is directed at facts suggesting an equitable tolling analysis rather than a state created impediment under § 2244(d)(1)(B).

innocent.

B. Equitable Tolling

In Calderon v. U.S. District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds, Calderon v. U.S. Dist. Court (Kelly), 163 F.3d 530 (9th Cir. 1998), the Ninth Circuit found that the statute of limitations could be equitably tolled if extraordinary circumstances beyond a prisoner's control made it impossible to file the petition on time.

Equitable tolling will not be available in most cases because tolling should only be granted if extraordinary circumstances beyond a prisoner's control make it impossible for him to file a petition on time. Beeler, 128 F.3d at 1288-89. As held in Beeler, "[w]e have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." 128 F.3d at 1289.

"Mere excusable neglect" is insufficient as an extraordinary circumstance. Miller v. New Jersey Dept. of Corrections, 145 F.3d 616, 619 (3rd Cir. 1998). Moreover, ignorance of the law does not constitute such extraordinary circumstances. See Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986).

In the Calderon (Beeler) case, the Court of Appeals held that the district court properly found equitable tolling to allow Beeler more time to file his petition. Beeler's lead counsel withdrew after accepting employment in another state, and much of the work he left behind was not usable by replacement counsel- a turn of events over which the court found Beeler had no control. The Court of Appeals held that the district court properly found these were 'extraordinary circumstances' sufficient to toll the statute of limitations.[7]

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7. See also Baskin v. United States, 998 F. Supp. 188 (D. Conn. 1998), wherein the court applied equitable tolling where petitioner's attorney failed to notify him of the denial of a petition for certiorari until thirteen months after the denial was entered.

The Ninth Circuit also found extraordinary circumstances in Calderon v. U.S. Dist. Ct. For Cent. Dist. Of Ca. (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc). The three reasons given which independently justified tolling were: a district court stay which prevented petitioner's counsel from filing a habeas petition, mental incompetency until a reasonable time after the court makes a competency determination, and the fact that petitioner did at one time have timely habeas proceedings pending which were mistakenly dismissed, not as a result of any doing by petitioner. Id. at 541-42. See also Miles v. Pruntv, 187 F.3d 1104, 1107 (9th Cir. 1999) (delay by prison in withdrawing funds from prisoner's trust account, preparing and mailing filing fee were circumstances beyond his control, qualifying him for equitable tolling).

Conversely, in U.S. v. Van Poyck, 980 F. Supp. 1108, 1110-11 (C.D. Cal. 1997), the court found that a petitioner's circumstances were not extraordinary: inability to obtain

transcripts from court reporters, and general prison lockdowns preventing the prisoner's access to the library and a typewriter which were necessary to his motion. See also Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (reliance on incompetence of jailhouse lawyers not sufficient to justify cause to excuse procedural default); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (prisoner's unfamiliarity of law did not toll statute); Eisermann v. Penarosa, 33 F.Supp.2d 1269, 1273 D.Haw. 1999) (lack of legal expertise does not qualify prisoner for equitable tolling); Henderson v. Johnson, 1 F.Supp.2d 650, 656 (N.D. Tex. 1998) (same); Fadayiro v. United States, 30 F.Supp.2d 772, 779-80 (D.N.J. 1998) (delay in receipt of transcripts does not justify equitable tolling).

In his opposition, petitioner outlines his attempts to exhaust his state court remedies, but states he was thwarted by the prison through required prison duties which was the

equivalent of a full time job, and that such duties occurred during the exact hours the law library was available. He contends he was able to file a petition with the appellate court in August, 1994, which was denied in September, 1994. At that time, however, petitioner claims he was denied access to the law library. He finally filed a prison grievance regarding lack of access, and it was repeatedly denied until February, 1996, when it was finally partially granted. At the time the AEDPA was enacted, petitioner claims that he was "barely ready to begin preparing his petition to the California Supreme Court." Oppo. at 6. Additionally, petitioner claims that in the years 1996, 1997, and 1998 Folsom Prison was subjected to a series of lockdowns, some of which lasted for months at a time. Furthermore, petitioner claims he was transferred from Folsom to Calipatria where he was separated from his legal property for two months. Finally, petitioner contends that he was unfamiliar with the law and initially was not aware that he had a claim for denial of access to the

courts. Consequently, petitioner asserts that the clock should "pause" from the date of AEDPA's enactment until the petition with the California Supreme Court was denied on April 29, 1998.[8/]

Respondent's reply proposes additional facts to contradict petitioner's argument. In regard to petitioner's job assignment, respondent represents that pursuant to a request by petitioner to change his job assignment, he was given a new assignment in March, 1996 which allowed him access to the law library. Thereafter, respondent argues, petitioner waited eighteen months before he filed the next habeas petition in the state court despite having access to legal materials. After this first post-expiration petition was denied by the state supreme court on April 29, 1998, petitioner waited another eight months to file a petition with the superior court.

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8. Even such a pause would not rescue the untimeliness of the August 30, 2000, federal petition.

In regard to prison lockdowns, respondent contend that California State Prison Sacramento offered a paging system during these periods so that prisoners could still receive copies of legal materials. Furthermore, respondent argues that lockdowns do not constitute grounds for equitable tolling.

The court need not attempt to resolve disputed facts about petitioner's real access to the law library absent an evidentiary hearing in that petitioner's allegations, taken on their face, do not warrant equitable tolling. First, whether viewed as a tolling problem, or a commencement of the running of the limitations problem, 28 U.S.C. § 2244 (d)(l)(B), petitioner's allegations are insufficient and belied by his lengthy direct appeal and collateral attack petitions. The record demonstrates that most of petitioner's present issues were raised by him long ago in the state system. Claim 6 herein, excluding evidence of third party culpability, was an issue in the 1992 direct appeal to the California appellate

court. Ineffective assistance of trial and appellate counsel were raised as issues in at least the 1993 and 1994 state habeas petitions. In 1997, petitioner raised the issue that he had a complete conflict with his trial counsel. Only the evolved Marsden and self-representation issues were raised in later state petitions, but even these issues were first raised over one year prior to the filing of the present federal petition (see February 1999 state superior court petition).

In sum, petitioner's continuing evolution of his claims does not stand as a basis for permitting his present federal attack on his decade-plus old conviction. As seen from the record supplied by respondent, over these years, petitioner was not so impeded in his access to the courts that he could not file numerous petitions. Even if petitioner was impeded for awhile because of prison lockdowns and job conflicts with his desire to use the law library, such routine prison life problems do not constitute extraordinary circumstances. Moreover, as demonstrated by the previously cited cases,

ignorance of one's "best" claims does not suffice to toll the limitations period.

C. Suspension Clause/Innocence

Some courts have suggested that dismissal of actual or legal innocence claims on grounds that they are barred by the statute of limitations violates the Suspension Clause (U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus may not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it.")). See Rodriguez v. Artuz, 990 F. Supp. 275, 283 (S.D.N.Y. 1998), affirmed, 161 F.3d 763 (2nd Cir. 1998) ("where no claim of actual or legal innocence was raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits ...[there is no] suspension of the writ."). See also United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099-1100 (C.D.Cal. 1998), affirmed, 245 F.3d 1108 (9th Cir. 2001).

Accordingly, this court considers whether petitioner's claims involve actual or legal innocence.

The petition raises the following claims: 1) breakdown in attorney/client relationship infected all proceedings, 2) petitioner was denied substitution of counsel, 3) petitioner was not allowed to represent himself, in violation of the constitution, 4) ineffective assistance of trial counsel, 5) ineffective assistance of counsel on appeal, and 6) denial of due process when trial court disallowed evidence of third party's culpability.

Attached as Exhibit B to respondent's motion to dismiss is a copy of the opinion of the California Court of Appeal denying his appeal. After reviewing this opinion and its factual summary, the court finds that petitioner's claims do not sufficiently implicate his innocence.

CONCLUSION

IT IS HEREBY RECOMMENDED that respondent's

February 13, 2001, motion to dismiss be granted and this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: July 9, 2001.

/s/
GREGORY G. HOLLOWS
UNITED STATES DISTRICT JUDGE

GGH:jv:bb
chav2496.mtd.wpd

APPENDIX E

FILED
SEP 29 1994
Court of Appeal-Third District
Robert L. Liston, Clerk
By _____/s/_____ Deputy

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

IN RE REGINALD CHAVIS, ON HABEAS CORPUS
Petitioner

3 Crim. C019058
Sacramento

By the Court:

The petition for writ of habeas corpus is denied.

Dated: September 29, 1994

/s/
PUGLIA, P.J.

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cc: See Mailing List

APPENDIX F

RECEIVED
NOV 5 - 1997
CLERK SUPREME COURT

S065691

Name Reginald Chavis H-08159

Address P.O. Box 29066

CDC or ID Number H-08159

SUPREME COURT
FILED
NOV 10 1997
Robert Wandruff Clerk
/s/
DEPUTY

FOR THE SUPREME COURT OF

THE STATE OF CALIFORNIA
(Court)

PETITION FOR WRIT OF HABEAS CORPUS

No. _____
(To be supplied by the Clerk of the Court)

Reginald Chavis H-08159 (in propria persona)
Petitioner

vs.

Respondent
Sue Hubbard (Acting Warden)

APPENDIX G

S065691

IN THE SUPREME COURT OF CALIFORNIA

IN RE REGINALD A. CHAVIS

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

SUPREME COURT
FILED
APR 29 1998
Robert Wandruff Clerk
/s/
DEPUTY

/s/
Chief Justice

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Catherine Chatman, a member of the Bar of this Court, hereby certify that on this 22th day of November, 2004, a copy of Petition For Writ Of Certiorari and Appendix, in the above-captioned case was mailed, via first class postage prepaid, in the United States Postal Service to:

Reginald Chavis (3 copies)
H-08159
Salinas Valley State Prison
PO Box 1020
Soledad, CA 93960-1020
(831) 678-5500

All persons required to be served have been so served.

Dated: November 22, 2004

Catherine Chatman

CATHERINE CHATMAN
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5364